Part 201 Liability/Compliance Workgroup
Meeting No. 1 – October 19, 2006
Summary

Workgroup Attendees
Steve Cunningham, RRD - Cadillac District Office
Charlie Denton, Varnum & Riddering
Mark D. Jacobs, Dykema Gossett
Doug McDowell, McDowell & Associates
Pat McKay, RRD - Compliance and Enforcement Section
Rick Plewa, Comerica Bank
Mary Jane Rhoades, Rhoades Mckee
Jeanne Schlaufman, RRD – Southeast Michigan District Office
Alan Wasserman, Williams Acosta, PLLC
Ed Weglarz, Service Station Dealers Association of Michigan

Observers
Chuck Barbeiri, Foster, Swift, Collins & Smith
Patti Brandt, RRD
Andy Hogarth, RRD
Rhonda Klann, RRD
Bob Wagner, RRD

Staff
Mark Coscarelli, Public Sector Consultants
Shivaugn Rayl, Public Sector Consultants

Agenda

I. Welcome and Introductions

Mark Coscarelli welcomed workgroup participants. Personal introductions followed.

II. Meeting Objectives/Guiding Principals

Mark Coscarelli discussed the meeting objectives and guiding principals that were added to the discussion outline. He reemphasized that the purpose of the workgroup was to develop recommendations that would be submitted for consideration by MDEQ Director Steve Chester. Mark indicated that while the current meeting was framed around the BEA/Due Care process, a substantive discussion on the current liability structure would need to occur.

Mark recommended that the group spend approximately half of the meeting to discuss a licensure program to augment the current regulatory structure, based on information developed by a member of the workgroup. In addition, the second part of the meeting would include a discussion on the current 201 liability structure.

Mark briefly reviewed the following guiding principles were summarized from the kick-off session held on September 25. They include

- Create a more efficient and protective regime, even if it involves some major changes.
- Maintain focus on implementation problem areas of the current program.
- Clean up more sites.
- Improve clarity of affirmative obligations.
- Improve risk reduction through a user-friendly, transparent process that includes agency accountability for the end results.
- Enable businesses to better interact with the agency.

These principals are designed to help frame the discussion for this workgroup to keep members focused on meaningful endpoints and outcomes.

III. Conceptual Framework, Licensure-based System

A member of the workgroup presented a conceptual framework for replacing the current regulatory structure with a license-based system. At the September 25 kick-off meeting, it had been requested by this member that the workgroup consider this conceptual model to determine if there is sufficient merit to proceed as a serious idea. It was suggested that the conceptual model is a response to the ineffectiveness of the current cost recovery model. Thus, the conceptual framework offers a paradigm shift that would provide a clearer distinction between liable and non-liable parties and to provide new incentives and disincentives for site cleanup, including heightened MDEQ enforcement capabilities. Failure to obtain a site license could result in strict liability for a party. The conceptual model also offers greater transparency than the current regulatory structure.

The history of the cost recovery model has shown it to be adversarial, litigious, and ineffective in inducing compliance. The conceptual model would shift the paradigm to one of cooperation between the regulated and regulating community by encouraging information exchange and allowing for a flexible, renewable, reviewable licensure system. At the same time, a cost recovery approach may be used as backup where this license system fails to induce responsible behavior by liable parties.

DEQ staff supported the workgroup's consideration of the framework. DEQ staff indicated that there is not enough money in the State cleanup fund to prioritize sites and undertake cleanup as currently administered. When the current program was instituted, the Michigan Legislature appropriated money from the general fund to the clean up program. That money is no longer available, and cleanups are not occurring to the extent they could be.

There was consensus not to refer to this conceptual framework as a permit system. One suggestion was a "certification" of ongoing due care compliance with liability protection. There wasn't consensus on how exactly to refer to it (but for purposes of this discussion it is referred to as a licensure system).

Fees were not discussed in the proposal, but it was recognized that this could be a costly program depending on how it could be structured. There was general consensus that that any proposed fee should be nominal. Pay-for-review programs in other states were mentioned as a model for this proposed program. It was also suggested that this type of approach may result in higher transaction costs. While it is debatable whether this approach is more expensive, it appears responsive to many of DEQ's concerns about the current program. It was further expressed that there were inefficiencies in the current program that could be cured by this approach which might lead to an offset in the cost of implementing the permit program.

This licensure model is intended to create a "living" document issued as a party becomes involved with a facility. Standardized general licenses or licenses by rule could be used for the most straightforward sites where complexity is not an issue. Site or contamination specific licenses would be issued in other cases. A license would serve as notice on the property facility status; it would list due care obligations; would be renewable, transferable, and provide an avenue for DEQ to collect site data. The level of detail required to obtain a license would be based on potential exposure pathways and potential contaminants on site and a schedule of compliance could be built in. Since a license would be renewable, it would be more effective than the current program at managing residual risk. In this sense, it would allow for increased approval of due care or remediation activities because actions can be approved on an interim basis while more information is gathered about the site. License conditions could contain periodic reporting requirements or site inspection plans. Licenses can continue to evolve on review as information about risk management on the site evolves. This would shift the program and staff emphasis to due care plans, away from the BEAs, which are generally perceived as ineffective to achieve the desired outcomes. For example, the conditions in a license are more likely to be addressed than those in a plan that isn't enforced and doesn't have an ongoing renewal component. Currently, the obligation to 'diligently pursue' due care duties is vague and doesn't induce performance.

Current Program Shortcomings

The workgroup discussed the BEA process. Consensus emerged that the BEA process puts too much emphasis on liability protection and not enough on protecting the public health and cleaning up sites. Site characterization under the BEA program focuses on determining if the substances proposed for use on the site are already present there. The BEA characterization doesn't create an index of the contamination present at the site. Subsequently, the information garnered from the BEA process is not useful in determining Due Care obligations. In addition, this process does not facilitate nor is it helpful in passing information about the site from current to subsequent owners/operators.

There was some discussion about the fact that new purchasers of facilities perform site characterizations under CERCLA Phase I and Phase II or independently as pre-purchase due diligence in order to protect their investment interest. This situation was said to make the BEA duplicative for new landowners. There was concern expressed that the BEA liability protection offered a valuable incentive for prospective purchasers and that if that incentive were removed, it would impede real estate transactions. There was a counter-concern expressed that corporations abuse the BEA liability exemption by dissolving and/or reforming a corporate entity that cannot be held liable. This leaves the DEQ with an impossible enforcement dilemma. One suggestion was that application for and adherence to a license would provide liability protection. It was suggested that 'facilitate property transactions' should be added to the workgroup's list of guiding principles.

It is difficult and time-consuming to get a RAP approved by the DEQ. The DEQ acknowledged that they must be extremely cautious in their approvals because approval assumes that the plan will be protective of the public health and address all possible means of protection, now and in the future—a complicated and lengthy process. Some expressed concerns that the delay in the approval process doesn't protect the public health either, and it is frustrating to parties seeking approval. Others were concerned with the endless iterations of data gathering and requests for more details. The DEQ is admittedly in a difficult position because they are administratively responsible for the effects of an approval and they must err on the side of protecting public health. Since they only get one chance when granting approval to make sure that all contingencies are addressed, they are hesitant to approve the plan in all but the most straightforward scenarios.

Another concern was the absence of a definition for "diligently pursue". Owners and operators don't have any real benchmarks for what it means to diligently pursue. Further, the term "diligently pursue" is so vague as to render it practically unenforceable by the DEQ. There was some general agreement that defining "diligent pursuit" and implementing standardized timeframes

would be an improvement to the program. Someone mentioned Part 213 Scheduled Compliance as a model. Bank credit approval processes might be positively impacted by increased certainty of more clearly defined "diligently pursue" and "due care" obligations.

IV. Liability Standards

DEQ identified corporate reorganizations as a hurdle to enforcement in the causation-based liability scheme. Corporate law allows LLCs to dissolve and reform and sever ties to their contamination liability. CERCLA has a provision that deals with this problem, but CERCLA hasn't been used in Michigan since 1995. Under CERCLA, the bona fide prospective purchaser must have no affiliation with the seller in order to avoid liability for contamination on the site. It was suggested a similar provision be added to Part 201 to close the loophole. Also, it was also agreed that an amendment to allow the DEQ to obtain additional documents could help pierce the corporate veil if unscrupulous activities are discerned. The current structure shifts the onus to the DEQ and it can be a difficult process.

It was also mentioned that a provision for Information Request Authority should be added to Part 201 to allow DEQ to examine corporate documents to determine when there was an unethical corporate restructure used solely to avoid liability for contamination. The negative result of these corporate shenanigans is more orphan sites and increased costs of clean up due to the extensive litigation that must be used to enforce cleanup obligations against corporations that no longer exist or are financially defunct.

A suggestion was made that Part 201 should be made to mirror CERCLA rules as it applies to improving the standard of review. It was proposed that this would lead to more cleanups.

There was some discussion about a proportional liability scheme. It was used in Illinois briefly. Determination of percentage of liability still rests with the courts. It isn't clear to what extent proportional liability would encourage settlement. PSC staff will endeavor to obtain information from Illinois on this subject as well as the existence of "license-based" programs in other states.

The meeting adjourned at 12:34 p.m.

Program considerations and conclusions from Meeting No. 1

Elements of a license-based or certification program

- Potential to be a useful tool when ensuring due care compliance, especially for non-liable parties.

- Could retain a causation-based liability scheme for owners and operators of a facility. New owners and operators may become strictly liable if they do not obtain a permit or license.
- Might facilitate greater transparency and flexibility to work toward solutions
- Might allow for efficient allocation of DEQ staff time and resources (dependent upon the ability of the DEQ not becoming burdened with disputable administrative processes).
- Could preempt endless iterations and requests for additional data by DEQ due to the current statutory provisions that limit DEQ reviews going forward.
- Emphasis shifts to performance, away from a preoccupation with plan details
- Provides more compatible framework for working with requirements from air/water permit programs
- Allows for a stepwise approach to site characterization and cleanup by employing a provision of renewability (e.g., licenses are renewable every 5 years). Periodic review and compliance would be tied to on-going liability protection
- Civil penalty/strict liability for failure to obtain license
- Cost recovery still available against liable parties

BEAs/Due Care

- The BEA process, as currently administered, places too much emphasis on administrative processes for avoidance of strict liability protection and not enough on site characterization, protecting public health, nor facilitating site clean up, and diverts staff resources away from potentially more important activities (current process does not meet original statutory intent of being able to distinguish old from new f or divisibility of harm).
- BEAs are often considered redundant and no different from Phase I and Phase II studies, though they do relieve liability. However, an owner/operator could demonstrate relief from liability on Due Care obligations
- Shifting the emphasis away from BEA approval to Due Care planning would reallocate staff resources to higher and better use, leading to greater protection of public health
- A license (program) would establish thresholds for review, compliance standards, and a timeline for execution
- The level of detail required for Due Care plans would need to be studied carefully as part of a shift to a license program
- Uncertainty about site conditions would be default provisions and require pathways to be considered as part of the Due Care planning process

Liability

- The onus to demonstrate site ownership and identify liable parties places a significant burden on DEQ resources

- Michigan's statute could be modified to require greater scrutiny of corporate transactions that seek to muddy ownership and limit liability. (i.e., Section 324.20117 information required to be furnished by related parties)
- Part 201 could be modified to be more consistent with CERCLA (i.e., Standard of Review)
- The plain language of "affirmative obligations" and "diligently pursue" is open to wide interpretation
- Proportional liability may provide some incentives for site cleanups, but additional information is needed to verify this claim (see attached).

Proportional Liability in Other States

For Discussion Only

An approach to hazardous contamination liability that has been instituted in some jurisdictions is a proportionate liability scheme. Under this regime, a liable party would only be responsible for the proportion of contamination that they actually caused, and then would be held responsible only for that portion of the cleanup efforts. This is an extension of the 'polluter pays' principle, but it also means that substantial amounts of cleanup costs may never be collected, resulting in 'orphan shares'. Insolvent liable parties or unknown contributing parties would leave the state with an unfunded cleanup bill. Also, wrangling in the courts over exactly what percentage of the total cleanup each liable party is responsible for could delay remediation efforts significantly.

At least two states have taken the approach that proportional liability may be used in some instances as an incentive to PRPs or prospective purchasers. In Ohio and Illinois, a proportional liability option has been made available to parties that voluntarily agree to cleanup activities. These programs apply the concept that proportional liability can be used as a reward to parties that proactively assume cleanup responsibilities. By assuming cleanup responsibilities and getting a determination of their specific proportion of liability, parties undertaking voluntary cleanups can ensure the financial certainty of their undertaking to a greater degree. These voluntary parties can then sue for cost recovery against other PRPs if they undertake cleanup activities beyond their proportional share.

A practical disadvantage of these proportional liability programs is that the unassigned proportion of liability often remains unfunded. The orphan share burden commonly falls on the regulating agency and on the taxpayers. Where a legislature can appropriate funds to cover these orphan shares, this is less problematic.

Illinois

Illinois operates a voluntary cleanup program, known as the Pre-Notice Program. It uses a proportionate share, causation-based determination for liability. Parties that volunteer to undertake cleanup activities are granted a determination of proportional liability if they prove by a preponderance of evidence that they are only liable to a certain extent. Those parties are then absolved of liability when they have undertaken their share of the remediation efforts, as determined by the Illinois EPA.

Sites that are subject to enforcement actions under other cleanup laws are not eligible for this program. Participants are required to enter into a Review and Evaluation of Services Agreement, which stipulates that all work done on site must be carried out in a manner

approved by the agency, requires agency access and oversight of the site, and specifies termination provisions for both parties.

Program participants typically must submit four documents to reflect proper corrective action activities at their site: a Phase I and II Environmental Site Assessment Report, a Response Action Plan, and a Response Action Certification. Agency review and approval of all four documents are required. These documents may be submitted one at a time or as a group. The average Illinois EPA oversight cost per site is just under $5,000.

Parties whose cleanup efforts need no further remedial action will receive a "No Further Remediation" letter, which says the site is clean and releases the remedial applicant (and others) from further liability. A copy of this letter must be filed with the property deed. Illinois EPA has a Memorandum of Agreement with U.S. EPA that effectively precludes federal involvement in the state's Pre-Notice Program cleanups, except in extraordinary situations of imminent threat to human health and the environment. A change in the land use of the remediated property could trigger a re-opener of the clean letter.

There is no discussion of orphan share funding in Illinois' Pre-Notice Program. Illinois does operate a hazardous site remediation program in which the state uses traditional cost-recovery methods for funding the cleanup in addition to appropriations from the State legislature. The state monitors an additional "short list" of high-priority hazardous waste sites, on which it collaborates on cleanup with the federal government.

Ohio

Ohio has instituted proportional liability in its Voluntary Action Program, a voluntary cleanup program. In order to participate in the voluntary program the site must not be the subject of enforcement under other cleanup laws. However, there are no restrictions on which parties can conduct cleanups. PRPs, as well as prospective purchasers, are eligible for the program. Liability for cost recovery from PRPs is strict and joint, but proportional. The volunteer party can file suit against all PRPs, and the share due from each is determined by the amount of contamination contributed to the site.

This program relies heavily in independent environmental professionals. The program has a limited oversight role, and relies mostly on Certified Environmental Professionals (CEPs) to oversee cleanups; this approach is patterned after the Licensed Site Professionals in the Massachusetts Clean Sites Initiative. There is no requirement for participants to submit initial applications, investigation, and remedial workplans, or information on completed activities. All of these activities are devised and carried out by the CEP. Parties and their respective CEP need only come to Ohio EPA after remedial activities have been completed. At that time, the CEP submits a No Further Action letter on behalf of the party, stating that cleanup activities have been implemented on the site. If Ohio EPA deems the NFA letter acceptable, it will grant the party a Covenant-Not-to-Sue.

Sources:
The *Northeast-Midwest Institute* available at http://www.nemw.org/cmclea4a.htm
Ohio VAP Homepage available at http://www.epa.state.oh.us/derr/volunt/volunt.html
Illinois EPA available at http://www.epa.state.il.us/land/site-remediation/index.html